

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, then a 60-year-old mail processor, filed a Form CA-1 claim for benefits on October 8, 2002 alleging that he sustained injuries to both shoulders and both knees causally related to employment factors. OWCP accepted a claim for right rotator cuff tendinitis. Appellant returned to a modified job with restrictions on lifting and using his right arm and right elbow. On November 19, 2010 he stopped working as the employing establishment no longer had a job available within his medical restrictions. Appellant began receiving compensation for temporary total disability.

By letter dated May 14, 2011, OWCP informed appellant that it was commencing payments for temporary total disability. The letter stated:

“RETIREMENT BENEFITS. You must report to the OWCP any retirement income you receive from any [f]ederal agency. This is because a person who receives compensation benefits under the FECA is not permitted to receive benefits under the Civil Service Retirement System (CSRS) or the Federal Employees’ Retirement System (FERS).”

By letter dated March 8, 2013, OWCP advised appellant that it had been informed that he was receiving benefits provided by OPM. It stated that benefits paid by OPM and benefits for wage loss paid by OWCP were not payable for the same period of time and that employees entitled to both OWCP and OPM annuity benefits must elect which benefit to receive. OWCP stated that it had enclosed a copy of election Form CA-1105. It advised appellant to complete the form and return it, at which time it would advise OPM of his election. OWCP advised him that if he elected compensation benefits, it would calculate the amount of compensation due from the beginning of his entitlement. It instructed appellant to complete the forms and return them to OWCP within 30 days.

On April 3, 2013 OWCP received a completed Form CA-1105 from appellant, who checked a box indicating that he had elected OPM retirement benefits from CSRS as of January 31, 2013.

On May 8, 2013 OWCP made a preliminary determination that appellant received an overpayment in the amount of \$6,950.54 due to his receipt of dual benefits from OPM and from OWCP during the period January 31 through April 6, 2013. It found that he was at fault in the creation of the overpayment because he failed to provide information which he knew or should have reasonably known to be material; and accepted payments which he knew or should have reasonably known to be incorrect. OWCP acknowledged that it had issued checks to appellant on January 13, February 10 and March 10, 2013 before his compensation benefits could be terminated. This resulted in an overpayment from January 31 through April 6, 2013.

OWCP calculated the amount of the overpayment for the period January 31 to February 9, 2013 by taking the amount of an OPM check from January 13 to February 9, 2013, \$2,919.18, dividing it by 28 calendar days, then multiplying this total for the 10 days in which the overpayment occurred; this totaled \$1,042.56. It added this amount to the February 10, 2013 check, in the amount of \$2,936.22; and the March 10, 2013 check, in the amount of \$2,972.18,

for a total overpayment of \$6,950.96. OWCP advised appellant that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. It requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

In a letter dated April 28, 2013, received by OWCP on May 28, 2013, appellant stated that his OPM retirement benefits did not start on January 31, 2013, but on April 25, 2013, under CSRS. This occurred pursuant to a letter he received from OPM dated February 25, 2013.² Appellant also attached letters dated April 23 and 24, 2013 from OPM, indicating that it had processed and submitted checks to him covering the period February 1 to April 30, 2013.

On May 21, 2013 appellant completed the overpayment questionnaire, listing his monthly income. He denied that an overpayment had occurred but stated that if there was any overpayment it had occurred through no fault of his own. Appellant also submitted arguments concerning his underlying compensation claims. He requested that OWCP make a decision on his overpayment based on the written evidence.

In a decision dated July 23, 2013, an OWCP hearing representative finalized the preliminary determination regarding the overpayment. The hearing representative modified the amount of overpayment, noting that OPM's payments did not commence until February 1, 2013. This resulted in an overpayment of \$6,846.71 for the period February 1 to April 6, 2013. OWCP stated that although appellant's CSRS payments did not begin until April 25, 2013, when he began receiving CSRS checks, the letters from OPM dated April 23 and 24, 2013 indicated that he received CSRS checks, which "covered the period" February 1 through April 30, 2013, when he was still receiving compensation checks from OWCP.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of FECA states that, while an employee is receiving workers' compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under FECA.³ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁴ The beneficiary must elect the benefit that he or she wishes to receive.⁵

² OPM's February 25, 2013 letter actually states that it would begin mailing appellant checks as of April 20, 2013.

³ 5 U.S.C. § 8116(a).

⁴ 20 C.F.R. § 10.421(a).

⁵ *Id.*

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$6,846.71 for the period February 1 through April 6, 2013.

Appellant received dual compensation from OPM in addition to wage-loss compensation he had been receiving under FECA during this period. The evidence of record establishes that he elected to receive OPM retirement benefits as of January 31, 2013. Consequently, any wage-loss compensation appellant received from OWCP for a period beginning on or after February 1, 2013 constitutes an overpayment of benefits. He is not eligible to receive wage-loss compensation and disability retirement benefits from OPM for the same time period.⁶ The record shows that appellant received an overpayment during the period in question because he received monthly checks for temporary total disability compensation, then received checks from OPM which covered the same period. OWCP calculated the \$6,846.71 overpayment by totaling the amount from three compensation checks he received during the period February 1 through April 6, 2013. The first overpayment, covering the period February 1 to 9, 2013, was calculated by taking the amount of the check from January 13 to February 9, 2013, \$2,919.18, dividing it by 28 calendar days, then multiplying this total for the 9 days in which the overpayment occurred; this totaled \$938.31. OWCP added this amount to the February 10, 2013 check, in the amount of \$2,936.22; and the March 10, 2013 check, in the amount of \$2,972.18, for a total overpayment of \$6,846.71.⁷ It determined that the entire amount of OWCP compensation appellant had received constituted an overpayment because he had received retirement benefits from OPM for the same period.

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$6,846.71 for the period February 1 through April 6, 2013.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁸ provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.⁹

⁶ 20 C.F.R. § 10.421(a); *see Franklin L. Bryan*, 56 ECAB 310 (2005).

⁷ These figures were confirmed on iFECS.

⁸ 5 U.S.C. § 8129(a)-(b).

⁹ *Bonnye Mathews*, 45 ECAB 657 (1994).

In determining whether an individual is with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which the recipient knew or should have known to be incorrect...."¹⁰

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide in relevant part:

"Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."¹¹

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment.

OWCP found that appellant was at fault in the creation of the overpayment as he was aware or should have been aware that he was not entitled to dual benefits. The record establishes that on May 14, 2011 he was informed that receipt of OWCP payments for loss of wage-earning capacity and receipt of an annuity from OPM constituted a dual benefit and that he was instructed to immediately contact OWCP if he did receive such benefits from OPM. By letter dated February 25, 2013, appellant was advised by OPM that he would receive OPM compensation in April 2013, pursuant to his election of benefits. Therefore, the record indicates that he knew or should have known that acceptance of compensation benefits for periods after February 1, 2013 was incorrect. However, appellant continued to accept payments after this date which he knew or should have known were incorrect. As he accepted compensation benefits from OWCP, which covered the period February 1 through April 6, 2013, the Board finds that he was at fault in the creation of the overpayment and is not entitled to waiver.¹²

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(b).

¹² *Lawrence J. Dubuque*, 55 ECAB 667, 673 (2004).

With respect to the recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹³ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection.¹⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$6,846.71 during the period February 1 through April 6, 2013 because he received dual compensation benefits from OPM and under FECA. The Board further finds that OWCP properly found that he was at fault in the creation of the overpayment and is therefore not entitled to waiver.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹³ *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁴ *Cheryl Thomas*, *id.*